No. 22190

United States
Court of Appeals
For the Ninth Circuit

ENERAL INSURANCE COMPANY OF AMERICA,
a corporation,

Appellant,

vs.

OCKWOOD WATER DISTRICT, a municipal corporation,

Appellee.

Appellee's Brief

ppeal from the Final Judgment of the United States District Court for the District of Oregon

The Honorable Robert C. Belloni, Judge.

)SEPH D. St. MARTIN,
12015 S.E. Stark St.,
Portland, Oregon 97216, and

RED A. GRANATA,
531 N.E. 123rd Ave.,
Portland, Oregon 97216,
Attorneys for Appellee.

ING, MILLER, ANDERSON, NASH & YERKE
REDRIC A. YERKE, Jr.
EAN P. LOWMAN
1200 American Bank Building
Portland, Oregon 97205
Attorneys for Appellant

FILED
DEC 19 1967
WM. B. LUCK, CLERK

DEC 21 1967

INDEX TO BRIEF

TABLE OF CASES AND AUTHORITIES

Cases

Table of Cases and Authorities (cont.)

Table of Cases and Authorities (cont.)

Table of Cases and Authorities (cont.)

Statutory Provisions

Texts

Table of Cases and Authorities (cont.)

STATEMENT OF THE CASE

Nature of the action

This is an action for a declaratory judgment brought by Rockwood Water District, a Municipal corporation (appellee) against General Insurance Company of America (appellant) to determine whether the defendant insurer is obligated under two comprehensive liability policies issued by it to Rockwood, to defend two actions brought against Rockwood, and to pay all damages and costs which Rockwood may become legally bound to pay in said actions. (R. 95)

Summary of facts

Rockwood cannot accept General's summary of the facts, as it is considered to be incomplete and contains certain inaccuracies; particularly the statement on p. 5 that, "Appellant was not notified that this action had been filed," (referring to the action of Rockwood vs. Beall Pipe & Tank Co.), and the statement on p. 6 that appellant learned of said action for the first time on October 7, 1964.

The following is a restatement of the facts which in Rockwood's view are supported by the record.

General issued two comprehensive public liability insurance policies to Rockwood, covering the period from June 1, 1962, to December 14, 1964, as set forth

on page 3 of appellant's brief, and containing the provisions, among others, quoted on page 4 thereof. The issuance of these policies came about in this way: Early in 1962, General's Portland agency, the W. R. Reed & Co., submitted a bid, along with its competitors, on Rockwood's insurance requirements. Preparatory to quoting, Reed made use of General's technical advisory service, and a technical adviser of that company made his own inquiries and investigation of the policies needed, risks involved, and loss ratio experience of the Rockwood Water District, and in the course of his investigation, ascertained that Rockwood had received complaints from some of its users of tar in the water, and that one or two of them had submitted claims for consequent damages to the water district. Agent Reed's quotation included an added premium to broaden coverage to an occurrence, rather than merely accidental basis. (Deposition of William R. Reed, pp. 5-14,Exh 26) Rockwood accepted Reed's bid and General wrote the first policy.

Between 1954 and 1961, Rockwood purchased and installed in its water system welded steel pipe, asphalt dipped and wrapped, manufactured by Beall Pipe & Tank Company, Portland, Oregon. This type of pipe had been successfully used in domestic water supply systems throughout the United States, and should have

had a reasonably expected life of 35 years. (Op. 3 & 4,[1] R 201-202; Paras. III(b) and (c), PTO, R 98, and Stipulation, Tr 29).

On February 21, 1961, one of Rockwood's water users made a claim for $2.95 for damages to clothing caused by tar particles in the water. Four claims were made, other than the Electronic's claim, prior to cancellation by defendant of its policy. These were in 1962 and 1963 and totaled $250. (Op 2, R 200; para. III (i), PTO, R 100, and Stipulation, Tr 31) In 1963, Rockwood engaged engineers to investigate the complaints about its water supply. The engineers determined that after the asphalt-coated steel pipe had been in service for from three to seven years, the interior asphalt coating started to flake and dislodge. (Op 3-4, R 201-202).

On March 1, 1963, Rockwood filed an action in the Circuit Court for Multnomah County, Oregon, against Beall Pipe & Tank Co., a corporation, No. 289869. The third amended complaint, on which the action was tried, alleged that Beall sold and delivered to Rockwood 183,560 lineal feet of asphalt coated water pipe, for which Rockwood paid $269,348; it alleged breach

---

[1] The opinion of the district court is at p. 199 of the record. The opinion served as findings of law and fact under Rule 52 (a), Fed. R. Civ. P. Appellant has not challenged the findings of fact of the district court.

of a warranty of merchantability, and sought damages in the sum of $669,348. The ad damnum paragraphs of the third amended complaint are as follows:

> "VII. That the reasonable value of said water pipe when delivered to the plaintiff should have been its purchase price, namely, $269,348.08, but that by reason of the failures and breaches aforementioned, the actual value of said pipe was the sum of $100,000 and that plaintiff on account thereof suffered damages in the sum of $169,348.08.
>
> "VIII. That as a direct and proximate result of defendant's breaches of warranty and the foregoing failures, the reasonable and expected life of said water pipe has been substantially reduced; plaintiff's entire circular type water system has been depreciated in value, said system and the water therein has been fouled and choked with loose asphalt material requiring plaintiff to spend large sums in the removal of said material and in repairing and in replacing parts of its system and that plaintiff will be required to spend large sums in the foreseeable future for such removal, repair and replacement, all to plaintiff's further and special damages in the sum of $500,000.00."

There was no claim by Rockwood in said action for damages, if any, suffered by Rockwood's customers. That action was tried to the court without a jury, from October 12 to October 22, 1964, and resulted in a judgment on March 1, 1965, in favor of Rockwood in the sum of $200,000. (Op. 5, R 203, and para. 5,

Amendment & Supplement to PTO, R 194). A certified copy of the judicial record of that action is attached to the pretrial order as Exh J (R 173-192).

Electronic Specialty Company's Portland plant was not in existence on March 1, 1963, when Rockwood filed its action against Beall. That company did not complete its plant and move into it until September of 1963 (Tr 90). Electronic came to the conclusion that it had a claim against Rockwood about June 27 or 28, 1964 (Tr 81), and its attorney, Stephen Parker, notified Rockwood of Electronic's intention to claim damages against Rockwood by a letter of July 9, 1964, although the amount of damages allegedly sustained had not at that time been determined (Exh 4). On January 25, 1966, Electronic Specialty Company filed a complaint in the United States District Court for the District of Oregon against the Rockwood Water District and Beall Pipe & Tank Co., claiming $65,400 damages for alleged losses sustained to its plant equipment and products of its manufacturing process, allegedly due to asphalt particles in the water supplied it by Rockwood. That action is now pending in said court. (R 96).

Mr. and Mrs. Raymond J. Spangler on January 24, 1965, submitted a written claim to Rockwood for alleged damages to clothes and appliances, and for inconvenience (R 97). On November 4, 1965, Spanglers filed an action in the Circuit Court for Multnomah

County, Oregon, against Rockwood, which as amended claimed $6,500 damages and continuing damages, allegedly resulting from Rockwood's failure to supply the Spangler's residence with water which was safe and adequate for their domestic use (R 97). That action was compromised and settled by Rockwood, after General had denied insurance coverage and refused a tender of the defense thereof, by the payment of $400 (R 193).

The Electronic Specialty Co. and the Spangler actions are the two damage actions which the district court has held are General's responsibility.

Rockwood transmitted the Electronic and Spangler claims to General. On October 23, 1964 (the day after the evidence in Rockwood vs. Beall was closed and the cause was submitted) General wrote Rockwood as follows:

> "This is to advise you that we shall make an investigation of the claims being asserted against you by Electronics Specialty Co. However, in doing so we are expressly reserving any and all rights to deny coverage under said policy at some later date for the following reasons, among others:
>
> * * * *
>
> "If at some later date we should settle such claims or pay any judgment, it would appear that our right to subrogation against Beall Pipe & Tank Corp. has been lost by your filing of the lawsuit to which reference has been made and to proceeding to trial of such lawsuit.

* * * *

. . . " (Exh 18, which is also Exh 1 to Deposition, Exh 91).

On July 12, 1965 (over eight months after the cause was submitted in Rockwood vs. Beall), General denied insurance coverage of either the Electronic or Spangler claims (R 96, 97; Exh E of PTO, R 162).

Appellant has stated in its brief (p. 6) that, "October 7, 1964, appellant learned for the first time of appellee's pending action against Beall." There was evidence, however, that General had been informed by Attorney Stephen Parker in late September, 1964, and on other occasions prior to October 7, 1964, of the Rockwood vs. Beall case. There was also testimony by General's adjuster, Thomas Klosterman, Jr., that he may have known about that suit in late August or early September, 1964, and that counsel for Rockwood informed him about September 21, 1964, that said counsel could not open up his files to the attorneys who were counsel for General, as the same attorneys were his opponents in the Rockwood vs. Beall suit, and suggested to said adjuster that General retain independent counsel to advise them as to their rights of subrogation and the like in connection with that suit. Since the evidence is apparently disputed on the question as to just when defendant acquired knowledge of the pendency of the

Rockwood vs. Beall suit, review of that evidence will be deferred to the argument.

In the district court, General denied coverage on the following grounds (Op 3, R 201):

(1) That the claims do not fall within the policy definition of "occurrence."

(2) That the claims are within an exclusionary clause.

(3) That Rockwood failed to satisfy the "notice" requirements of the policy.

(4) That as the result of a judgment in an action by Rockwood against Beall Pipe & Tank Company, any rights to subrogation that General Insurance would have under the provisions of the policies have been prejudiced and extinguished.

(5) That by reason of the cancellation of the policy on December 14, 1964, no coverage existed as to either claim.

General's appeal questions the correctness of the district court's determination of the fourth ground above; all others have been abandoned.

Questions presented on appeal:

The appeal presents these principal questions:

1. If an insurer denies liability for a claim on specific grounds, does it waive other grounds then within its knowledge?

2. Can an insurer deny coverage under its policy and at the same time claim that its rights of subrogation were prejudiced?

3. Did the defendant insurer waive any right to subrogation by its own negligent conduct in failing to take timely action to protect its rights, if any?

4. Is a judgment in favor of a water district against a pipe manufacturer for dimunition in the value of asphalt coated pipe and depreciation of the water system in which such pipe was installed, res judicata as to future possible liability by the district to water users for damages allegedly caused by water containing asphalt particles which flaked and dislodged from the pipe?

SUMMARY OF ARGUMENT

I. By denying coverage under Rockwood's policies of the Electronic and Spangler claims on specific grounds, not including loss of subrogation rights, General waived other grounds then within its knowledge, including alleged loss of subrogation rights.

II. General cannot deny coverage under its insurance policies and at the same time claim that its rights of subrogation were prejudiced.

III. If General's rights of subrogation were prejudiced by the judgment in Rockwood vs. Beall, it was due to General's own negligent conduct in failing to take timely action to protect its rights, if any.

IV. The judgment obtained by Rockwood against Beall for loss of value of water pipe due to its shortened life and for consequential damages to Rockwood's water system is not res judicata of any cause of action of Electronic Specialty Company or Spanglers against Rockwood or Beall for damages due to water allegedly containing asphalt particles.

PROPOSITION OF LAW NO. I: BY DENYING COVERAGE UNDER ROCKWOOD'S POLICIES OF THE ELECTRONIC AND SPANGLER CLAIMS ON SPECIFIC GROUNDS, NOT INCLUDING LOSS OF SUBROGATION RIGHTS, GENERAL WAIVED OTHER GROUNDS THEN WITHIN ITS KNOWLEDGE, INCLUDING ALLEGED LOSS OF SUBROGATION RIGHTS.

POINTS & AUTHORITIES

1. If an insurer denies liability for a claim on specific grounds, it waives other grounds then within its knowledge.

29A AmJur, Insurance 262, Sec. 1098.

Ward v. Queen City Ins. Co., 69 Or 347, 352-354, 138 P 1067, 1069.

Eaid v. National Casualty Co., 122 Or 547, 557-559, 259 P 902, 906.

ARGUMENT

When General finally on July 12, 1965 (Exh E of PTO, R 162, which is also Exh 69) took a position on the Electronic and Spangler claims, it denied coverage of its policy on several grounds: That the claims did not constitute occurrences as defined in the policy; that the claims were within an exclusionary clause; and that defendant was not given timely notice of the occurrences. General's July 12, 1965, letter **did not** specify loss of subrogation rights as a ground for its refusal of liability. If the rule is applied that the insurer is limited to the grounds it did assign, its present standing to litigate its alleged loss of subrogation rights is highly questionable. 29A **AmJur Insurance** 262, Sec. 1098; **Ward v. Queen City Ins. Co.,** 69 Or 347, 352-354, 138 P 1067, 1069; **Eaid v. National Casualty Co.,** 122 Or 547, 557-559, 259 P 902, 906.

PROPOSITION OF LAW NO. II: DEFENDANT CANNOT DENY COVERAGE UNDER ITS INSURANCE POLICIES AND AT THE SAME TIME CLAIM THAT ITS RIGHTS OF SUBROGATION WERE PREJUDICED.

POINTS & AUTHORITIES

1. An insurer cannot deny coverage under its policy and at the same time claim that its rights of subroga-

tion were prejudiced. The denial of coverage relieves the insured from his obligation not to release the wrongdoer by settlement or judgment.

Anno. 49 ALR2d 694, 744.

Anno. 67 ALR2d 1086, 1087-1088.

6 Appleman, Insurance Law and Practice, Sec. 4093, Pocket Supplement.

Jaloff v. United Auto Indemnity Exch., 121 Or 187, 198, 200, 253 P 883, 887, 888 (1927).

Roberts v. Fireman's Ins. Co. of Newark, N.J., 376 Pa 99, 101 A2d 747, 750 (1954).

Otteman v. Interstate F. & Cas. Co., 172 Neb 574, 111 NW2d 97, 101, 89 ALR2d 1182 (1961).

Maryland Cas. Co. v. Employers Mut. Liability Ins. Co. (D Conn. 1953), 112 F Supp 272, 275.

ARGUMENT

In the district court, the defenses were the same as those specified in General's July 12, 1965, letter denying coverage, and the additional defense that as a result of the judgment in favor of Rockwood against Beall, defendant's rights to subrogation were prejudiced and extinguished. The denial of coverage was a repudiation of the insurance policies. The district court

disagreed with General's denial of coverage and held that the policy did afford Rockwood coverage of the Electronic and Spangler claims, and General has not appealed from that ruling. Yet, General contended, and still contends, that the policy, even though repudiated by it, was and is binding on Rockwood; that Rockwood was not free to protect its own rights.

The Supreme Court of Pennsylvania in **Roberts v. Fireman's Ins. Co. of Newark, N.J.,** 376 Pa 99, 101 A2d 747 (1954), very clearly stated the applicable rule, as follows:

> " . . . Here, the insurance company not only did not offer to pay the insureds' claim under the policy or any part of it but, as expressed by its own designated adjuster, persisted in denying liability on the ground that the loss was not covered by the insurance contract. If anyone can be said to have repudiated the policy, it was the insurer rather than the insured. Yet, the company now seeks to avoid liability under the policy by claiming that the insured violated the contract and, in so doing, extinguished the insurer's right of subrogation. The contention is manifestly without merit." (101 A2d 747 at 749-750).

The same rule has been adopted in Oregon: **Jaloff v. United Auto Indemnity Exch.,** 121 Or 187, 198, 200, 253 P 883, 887, 888 (1927). Other authorities to the same effect are: **Anno.** 49 ALR2d 694, 744; **Anno.** 67 ALR2d 1086, 1087-1088; 6 **Appleman, Insurance Law and Practice,** Sec. 4093, Pocket Supplement; **Otteman**

v. Interstate F. & Cas. Co., 172 Neb 574, 111 NW2d 97, 101, 89 ALR2d 1182 (1961); **Maryland Cas. Co. v. Employers Mut. Liability Ins. Co.** (D Conn. 1953), 112 F Supp 272, 275.

It is, therefore, unnecessary to decide whether the judgment in Rockwood vs. Beall released Beall from any liability for the Electronic and Spangler claims, because General's denial of coverage relieved Rockwood from its policy obligation, if any, not to release the wrongdoer by judgment.

PROPOSITION OF LAW NO. III: IF GENERAL'S RIGHTS OF SUBROGATION WERE PREJUDICED BY THE JUDGMENT IN ROCKWOOD VS. BEALL, IT WAS DUE TO GENERAL'S OWN NEGLIGENT CONDUCT IN FAILING TO TAKE TIMELY ACTION TO PROTECT ITS RIGHTS, IF ANY.

POINTS & AUTHORITIES

1. Where a party against whom an ultimate liability is claimed is given reasonable notice of the claim, and that the action is pending and given the opportunity to participate, if he then neglects or refuses to do so, the judgment will bind him to the same extent as if he had been made a party to the record.

Astoria v. Astoria & Columbia River R. Co., 67 Or 538, 549-550, 136 P 645, 649 (1913).

Estep v. Bailey, 94 Or 59, 68, 185 P 227, 230 (1919).

Bedal v. Hallack and Howard Lumber Company (9th Cir. 1955), 226 F2d 526, 535.

Anno. 73 ALR2d 504, 507.

2. Unreasonable delay of the insurer in processing a claim against its policy, or in determining whether it will participate in the insured's action against the wrongdoer, amounts to a denial of coverage and constitutes a waiver of its right, if any, to subrogation, thus leaving the insured free to take such action as reasonable prudence may indicate to be advisable.

Anno. 16 ALR2d 1269, 1275.

Powers v. Calvert Fire Ins. Co., 216 SC 309, 57 SE2d 638, 642, 16 ALR2d 1261 (1950).

Otteman v. Interstate F. & Cas. Co., 172 Neb 574, 111 NW2d 97, 102-103, 89 ALR2d 1182 (1961).

Poole v. William Penn Fire Insurance Company (Ala. 1955), 84 So2d 333, 336.

3. A right of subrogation is lost by inexcusable negligence on the part of the person asserting it.

Maryland Title & Escrow Corporation v. Kosisky, 245 Md 13, 225 A2d 47, 51 (1966).

Webber v. Frye, 199 Iowa 448, 202 NW 1, 2 (1925).

ARGUMENT

This proposition of law relates only to the Electronic claim, as the district court found that Spanglers did not claim damages from Rockwood until January 24, 1965, which was four months after the Rockwood vs. Beall cause was submitted to the court. Since there could be no amendment after the cause was submitted (**ORS** 16.390[1]), any question of amending to bring in the Spanglers is eliminated.

---

[1] **ORS** 16.390. "The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause; and in like manner and for like reasons may, **at any time before the cause is submitted,** allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming the pleading or proceeding to the facts proved." (Emphasis added)

The record shows the following facts relating to the Electronic claim:

Electronic came to the conclusion that it had a claim against Rockwood about June 27 or 28, 1964 (Tr 81), and its attorney, Stephen Parker, notified Rockwood of Electronic's intention to claim damages by a letter of July 9, 1964 (R 159), at the same time dispatching a similar letter to Beall Pipe & Tank Co. (Tr 71). Not later than August 17, 1964, and probably as early as July 14, 1964 (Exhs 5 and 6), counsel for Rockwood telephoned W. R. Reed & Company, the insurance agency, advising of the Electronic claim, and this was followed by a letter of August 31, 1964 (R 96; Exhs 6 and 15). General, in its brief (p. 5), has attempted to set back to January, 1964, the time when Electronic claimed damages against Rockwood. This was when Max Sawyer, the Engineering Administrator of Electronic, telephoned the Rockwood office and complained that Electronic had tar in its water which was getting into its welding water cooling lines and that its boiler was corroded (Tr 91-92; para. II(d), PTO, R 96). General neglects to inform the court, however, that Mr. Sawyer in his testimony disclaimed having sustained any damages in January, 1964 (Tr 96), or that the trial court made a finding on this point as follows: "I find that when Rockwood first received telephone complaints they had no reason to believe that claims for

damages would arise, and when the claims did arise, Rockwood gave notice, as required by the policies." (Op 5, R 203).

Reed transmitted Rockwood's August 31, 1964, letter to General's branch claims office in Portland on September 3, 1964 (Exh 7). Mr. Thomas K. Klosterman, Jr., who was then General's adjuster, but is no longer in its employ, testified in his first deposition [1] that the first notice he had of the Electronic claim was a telephone call from Attorney Stephen Parker, "telling me if I didn't get out of my chair and get on the road I was going to be in serious trouble." "This was in the first part of October, and to be more specific, either the last of the first week or the beginning of the second week in October of 1964." (Klosterman Depo. 1-9) In his second deposition, however, Mr. Klosterman, when faced with the fact that he had set up a claims file on September 9, 1964, relating to the Electronic claim (Exh 8), had to admit that his prior testimony "is not what you call untrue or anything, but it is not correct." " . . . it appears to me that I was off just about one whole month of my prior deposition." "This actually - here I am talking about October. It actually occurred

---

[1] There are two depositions of Thomas K. Klosterman, Jr., the first taken February 4, 1967, and the second April 12, 1967. They are identified herein as Klosterman Depo. I and II, followed by the page number.

in September." (Klosterman Depo. II-15) He testified this time that his first notice of the Electronic claim was a memorandum from W. R. Reed & Company of September 3, 1964. (Klosterman Depo. II-10-11).

Mr. Klosterman acknowledged that General's drive-in claims service was not up to par in this case, when he testified as follows:

(Klosterman Depo. II-11)

"Q Well, did you make an investigation, make any phone calls, or talk to anyone from Rockwood or Electronic, or an agent or anyone else before it was officially assigned?

"A No, I sat on that letter until I started getting calls from an attorney, Steve Parker. He called me twice, and he called Tom Wernette[1] the third time. An appointment was made, and we went out to Electronic Specialty Company. I did no investigating prior to that time."

He also acknowledged that during the five weeks during which he "sat on that letter" he had telephone calls from Rockwood's counsel, as well as from Mr. Parker (Klosterman Depo. II-11, and Exh 9).

---

[1] Tom Wernette was Claims Manager of General's Portland branch office.

Regarding notice of the pendency of the Rockwood vs. Beall case, Mr. Klosterman testified as follows: (Klosterman Depo. 1-25-27)

"Mr. St. Martin: Q Do you recall a conversation with me prior to the Rockwood trial in which I suggested that you, your company retain the services of an attorney to advise you about subrogation and the like because we were going to trial, and that you would be reporting to your superiors?

* * * *

"The Witness: I do recall your telling me this, Joe, but, of course, to recollect on the time angle - yes, I do recall your telling me this.

* * * *

"Q Do you recall my telling you in our first conversations that I would not turn over confidential information to the Mautz, Souther firm because they were defending Beall?

"A I remember this, Joe. Yes, I do."

As to the time of the conversations just referred to, Mr. Klosterman first testified that the conversations took place during the trial of Rockwood vs. Beall (Klosterman Depo. 1-28). He acknowledged, however, that he could be mistaken on the time (Klosterman Depo. 1-29). In his second deposition, however, he testified that he recalled meeting Rockwood's counsel in the courthouse coffee shop **about September 21, 1964,**

and discussing the matter of the Rockwood vs. Beall suit, at which time Mr. St. Martin gave him the title of the case and copies of some of the pleadings. He further testified regarding that suit as follows:

(Klosterman Depo. II-8)

"Q I take it that your testimony is that you knew on September 1st that we were going to trial or would be but didn't know the exact date?

"A If this meeting of ours was on the 21st, **it is possible that I knew about the trial in early September or late August** through a previous phone call or meeting. As I recall, we met one time prior to our meeting at the courthouse to discuss the matter, and I am sure I was aware at that time that we were going to trial."

On cross examination, he testified as follows:

(Klosterman Depo. II-19)

"Q Isn't it a fact that actually you learned of the pendency of the Rockwood versus Beall lawsuit at the conference at Electronic Specialty on October 7th and that after leaving that meeting you and Messrs. Wernette and Carson decided to call me the next day and retained me because of the fact that you had learned of the lawsuit? Dan't you recall that?

"A **I recall our discussion and our coming over here to retain you because Mautz was involved with Beall Pipe & Tank Company.** I don't recall on that particular date their mentioning anything

about their lawsuit, but of course, it is possible that my superior made this up. It is possible that it was his main concern at the time. It is possible that Joe and I met at the Courthouse after this day."

Rockwood's request that General retain independent counsel was renewed at a later date, as shown by Mr. Klosterman's further testimony as follows:

(Klosterman Depo. 11-24)

"Q Do you recall the conversation in front of the Hilton Hotel at a later date?

* * * *

"A One of the things I recall is that you were not going to deal with me but only with my attorney. You didn't want to - you were not going to open your file to us. You would give our attorney some information.

"Q Was it also stated to you that no attorney had contacted me at that date as yet, and renewal of the request was made for you to retain counsel?

"A I think that is correct."

A disinterested witness, Stephen Parker, in his testimony confirmed that General had notice of the Rockwood vs. Beall case at least by late September of 1964. Mr. Parker testified that he had learned in July, 1964, in talking with the attorneys for Beall and Rockwood,

of the lineup of the insurance carriers that might be involved in the Electronic case (Tr 73). He arranged for James Bruce (of the Mautz firm) and James Burns, the attorneys for Beall, and the attorneys for Rockwood, and agents of General to view the Electronic plant. Mr. Parker further testified as follows:

(Tr 78)

"Q When did you communicate this invitation to the General people?

"A I would say that I did it late in September of 1964.

"Q Did you explain to him the reason for inviting them?

"A Yes, I did.

"Q Did the matter of an impending trial, that is, to-wit, the Rockwood-Beall trial, come up in your discussions with the General people?

"A According to my memory, it did, because I recall prefacing my conversation with Mr. Wernette by saying that, 'Both sides in Rockwood vs. Beall have asked to see our plant, and I'm making arrangements for that purpose'. I selfishly said, 'I'd like to have you come out to try to orient you to the case that I have on behalf of Electronics against either Rockwood or Beall or both.'

The meeting of October 7, 1964, at the Electronics plant then took place. This is the date on which General claims in its brief (p. 6) that it "learned for the first

time of appellee's pending action against Beall." This assertion is taken from General's reservation letter of October 23, 1964, signed by Thomas E. Wernette, Claims Manager (Exh 18). General in its brief also cites in support of that date a memorandum written by Mr. Klosterman to Mr. Bachtel, N.W.D.-Claims on October 17, 1964 (Exh 16), and the first deposition of Mr. Klosterman. It conflicts, however, with the second deposition of Mr. Klosterman and with the testimony of Mr. Parker and it is noted that General did not put Mr. Wernette on the witness stand after Mr. Klosterman's second deposition. One other item of evidence confirms that it was about September 21, 1964, that Mr. Klosterman and counsel for Rockwood discussed the Rockwood vs. Beall suit. As shown by Mr. Carson[1]'s notes of the October 7, 1964, meeting (Exh 13), Mr. St. Martin did not attend that meeting; therefore his conversations with Mr. Klosterman had to be prior to that date.

To summarize the salient facts: Rockwood's August 31, 1964, notice letter was received in General's Portland claims office on September 4, 1964, but the adjuster testified that he did no investigating prior to October 7, 1964. Before October 7, 1964, General's adjuster received two calls from Attorney Stephen

---

[1] Mr. Carson was manager of the Portland branch claims office.

Parker, and he also had calls from Rockwood's counsel, as well as at least three meetings with him. Mr. Parker also called Thomas Wernette, the Portland Claims Manager. Not later than about September 21, 1964 (20 days before the Rockwood vs. Beall trial), Rockwood's counsel suggested to the adjuster that his company retain independent counsel to advise them as to subrogation and the like in connection with that suit. General did retain counsel not involved in the Beall suit, but, according to its agent, Mr. Wernette, not until October 8, 1964. General made no attempt to dispute the reason assigned by Mr. Klosterman in his testimony, "because Mautz was involved with Beall Pipe & Tank Company." Not until Rockwood vs. Beall trial was concluded did General do anything with reference to that suit, nor did it offer any suggestions to Rockwood as to what it considered would be a proper course of action on Rockwood's part. The day after that trial was concluded, General wrote Rockwood advising that it would make an investigation of the Electronic claim, but that it was reserving the right to deny coverage at some later date for the reason, among others stated in the letter, that "it would appear that our right to subrogation against Beall Pipe & Tank Corp. has been lost by your filing of the lawsuit to which reference has been made and to proceeding to trial of such lawsuit." Finally, on July 12, 1965, over eight months after the Rockwood vs. Beall cause was submitted

to the court and over four months after judgment was entered therein, General denied covrage of the Electronic claim.

It is Rockwood's position that the Electronic claim was not involved in any way in Rockwood's action against Beall, and that such claim is not affected by the judgment therein. Nevertheless, if General considered that it had rights of subrogation which required protection, it had ample time and opportunity, before trial , to take whatever measures it might have deemed appropriate to assert its claims. The remedy, if any was needed, therefore, lay in General's hands.

Moreover, it is undisputed that General was specifically requested by Rockwood's counsel to retain an attorney not involved in the Rockwood vs. Beall suit to advise it as to subrogation and the like. This request was not an acknowledgment that General had any rights of subrogation affected by that suit, but rather a recognition that General might claim to have. The time of this request apparently is disputed, but a reasonable conclusion to be drawn from the evidence is that the request was made not less than 20 days before trial, and the evidence is plain enough that General had knowledge of the Rockwood vs. Beall suit long before that. Also, when the first request produced no response, and the trial date was nearing, the request was renewed.

In **Astoria v. Columbia River R. Co.,** 67 Or 538, 136 P 645 (1913), the Supreme Court of Oregon said:

> " 'It is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim and that the action is pending with full opportunity to defend or to participate in the defense. If he then neglects or refuses to make any defense he may have, the judgment will bind him in the same way and to the same extent as if he had been made a party to the record.' This doctrine was approved by the Supreme Court of the United States in Washington Gaslight Co. v. District of Columbia, 161 US 316 (40 LEd 712, 16 SupCtRep 564)." (67 Or 538 at 549; 136 P 645 at 649).

To the same effect: **Estep v. Bailey,** 94 Or 59, 68, 185 P 227, 230 (1919); **Bedal v. Hallack and Howard Lumber Company** (9th Cir. 1955), 226 F2d 526, 535; **Anno.** 73 ALR2d 504, 507.

This principle of law could be held to make the judgment in Rockwood vs. Beall conclusive against General to the same extent as though it had been a party to that case. General's advice in its brief on appeal (p. 21) as to what it would have considered a proper course of action on Rockwood's part prior to trial of the Beall suit, is somewhat tardy. It is noted that, although General cites no authority to support either course of action it now suggests Rockwood should have taken, it criticizes the lack of citation of authority for the

trial court's holding that Rockwood had done nothing to prejudice General's rights of subrogation.

An insurer may by implication from its conduct waive any right to subrogation. Thus, in **Powers v. Calvert Fire Ins. Co.,** 216 SC 309, 57 SE2d 638, 16 ALR2d 1261 (1950), where the insurer passively or negligently failed to take any action on the insured's claim for collision insurance on his automobile which was demolished in an accident, despite numerous telephone calls by the insured to the insurer's agent, and equally numerous promises in response, as a consequence of which the insured made a settlement with the wrongdoer, the Supreme Court of South Carolina commented on the insurer's defense of loss of subrogation rights as follows:

> "An insurer will not be permitted to profit from such a course of conduct. It cannot sit down and hold its hands and purse and thereafter escape liability for fulfillment of its contract by reason of the insured's effort, after fair notice, to recoup his loss by litigation against a wrongdoer. Appellant asserts that its right of subrogation has been destroyed by the voluntary act of the insured, but the right did not survive the recited conduct of appellant which amounted at least to waiver . . .
>
> " . . . It would be highly inequitable under the facts of this case to allow appellant to shield itself from liability upon its contract obligation by the ghost of a formerly available right of subrogation . . . . " (57 SE2d 638 at 642)

Other authorities for holding that under the facts such as those in the case at bar the insurer's unreasonable delay in taking action on the insured's claim after notice amounts to a denial of coverage and a waiver of subrogation rights are: **Anno.** 16 ALR2d 1269, 1275; **Otteman v. Interstate F. & Cas. Co.,** 172 Neb 574, 111 NW2d 97, 102-103, 89 ALR2d 1182 (1961); **Poole v. William Penn Fire Insurance Company** (Ala. 1955), 84 So2d 333, 336.

Another principle of law is invoked by the facts disclosed by the evidence: "The fact that the loss of one who seeks to be made whole by subrogation arose from his own negligence may be fatal to his claim." **Maryland Title & Escrow Corporation v. Kosisky,** 245 Md 13, 225 A2d 47, 51 (1966); **Webber v. Frye,** 199 Iowa 448, 202 NW 1, 2 (1925).

PROPOSITION OF LAW NO. IV: ROCKWOOD'S PRIOR JUDGMENT AGAINST BEALL IS NOT RES JUDICATA OF RIGHTS OF ROCKWOOD OR ITS INSURER TO BE INDEMNIFIED BY BEALL FOR CLAIMS OF THIRD PARTY USERS AGAINST ROCKWOOD IN ABSENCE OF PAYMENT OR ADMISSION OF LIABILITY BY ROCKWOOD FOR USERS CLAIMS.

POINTS & AUTHORITIES

1. A cause of action must exist before an action can be commenced, and its existence or nonexistence is dependent upon the state of facts existing when the action was begun, not at some subsequent time.

1 AmJur2d, Actions 590, Sec. 58; p. 616, Sec. 87.

Freeman on Judgments (5th ed) 1510, Sec. 716.

City of Reedsport v. Hubbard, 202 Or 370, 384, 274 P2d 248, 254 (1954).

2. A judgment cannot operate as a bar of rights which did not accrue until after the action was brought.

Restatement, Judgments, Sec. 54.

Freeman on Judgments (5th ed) 1258, Sec. 597.

Hunter v. Roseburg, 80 Or 588, 598-599, 156 P 267, 270, 157 P 1065 (1916).

3. The doctrine of res judicata is confined to the issues as tendered by the pleadings, and does not extend to matters which might have been litigated under issues formed by additional pleadings.

30A AmJur, Judgments 422, Sec. 375.

4. Leave to intervene may be granted an indemnitor in the exercise of sound discretion, but not as a matter of right, even during trial, if the indemnitor has interests to protect.

ORS 13.130.

Barendrecht v. Clark, ---------Or---------, 83 OrAdvSh 409, 411-413, 419 P2d 603, 604-605 (1966).

5. A new and distinct lawsuit should never be injected into a case by supplemental pleading.

United States v. Southern Pac. Co. (D. Ore 1947), 75 F Supp 336, 339.

6. The Oregon Code of Civil Procedure contemplates that the issues be determined as they are presented for adjudication between the original parties to an action. It is only when they cannot be determined without prejudicing the rights of others, that other parties can be brought in by the court.

ORS 13.110.

Tichenor v. Coggins, 8 Or 270, 271-272 (1880).

Continental Guar. Corp. v. Chrisman, 134 Or 524, 530, 294 P 596, 598 (1930).

McGilchrist v. Fiedler, 155 Or 616, 621, 65 P2d 388, 390 (1937).

Brune v. McDonald, 158 Or 364, 371-373, 75 P2d 10, 13 (1938).

State Highway Com. v. Superbilt Mfg. Co., 200 Or 478, 482, 266 P2d 1072, 1074 (1954).

Union High Dist. No. 2 v. LaClair, 218 Or 493, 495-497, 344 P2d 769, 770-771 (1959).

7. Payment of the debt for which another is primarily responsible is essential to a claim of subrogation.

Furrer v. Yew Creek Logging Co., 206 Or 382, 388, 292 P2d 499, 502 (1956).

Hult v. Ebinger, 222 Or 169, 190, 352 P2d 583, 592 (1960).

8. If a consumer recovers damages from a distributor, caused by a defective product purchased from the distributor, the distributor has a prima facie right of indemnification from the manufacturer of such product.

5 Williston on Contracts (Rev. ed 1937), Sec. 1355.

3 Williston on Sales (Rev. ed 1938), Sec. 614a.

Pipe Welding Supply Co. v. Gas Atmospheres, Inc. (N.D. Ohio, E.D. 1961), 201 F Supp 191.

9. A considerable body of judicial opinion allows a distributor to recover anticipatory damages from his manufacturer for the distributor's possible liability to consumers for selling and furnishing them a defective product, which has or may cause harm to them; but the

decisions are in conflict as to when anticipatory damages can be allowed.

Allowing anticipatory indemnification

Randall v. Raper, Q.B. 4 Jur (N.S.) 662, El. B. & El. 84, 89-91, 120 Eng Rep 438, 440-441 (1858)

Buckbee v. P. Hohenadel, Jr. Co., (7th Cir., 1915), 224 F 14, 23, LRA 1916C 100.

Fred Wolstenholme v. Jos. Randall & Bro., 295 Pa 131, 144 A 909, 910 (1929).

Cohan v. Associated Fur Farms, 261 Wis 584, 53 NW2d 788, 794 (1952).

W. S. Rockwell Co. v. Lindquist Hardware Co., 143 Conn 684, 125 A2d 173, 174 (1956).

Somerville Container Sales v. General Metal Corp., 39 NJ Super 348, 120A2d 866, 872-873 (1956), modified 39 NJ Super 562, 121 A2d 746.

Allowing anticipatory indemnification but restricting recovery to cases meeting rigid standards

Superwood Corporation v. Larson-Stang, Inc. (8th Cir., 1963), 311 F2d 735, 740.

Southern Arizona York Refrigeration Co. v. Bush Mfg. Co. (9th Cir., 1964), 331 F2d 1, 6.

Grummons v. Zollinger (7th Cir., 1965), 341 F2d 464, 465.

Boyce v. Fowler (D. Mass., 1949), 87 F Supp 796, 799.

10. There is, however, a considerable body of judicial opinion refusing to adopt the rule of possible liability and restricting indemnification to those instances where the distributor's liability to his consumers has been adjusted, adjudicated, or paid.

Sewall Paint & Glass Co. v. Booth Lumber & Loan Co. (TexCivApp 1931), 34 SW2d 650, 654, affd (TexComApp 1932), 50 SW2d 793.

Liberty Mut. Ins. Co. v. J. R. Clark Co., 239 Minn 511, 59 NW2d 899, 904-905 (1953).

The Gray Line Co. v. The Goodyear Tire & Rubber Co. (9th Cir., 1960), 280 F2d 294, 301-303.

Pipe Welding Supply Co. v. Gas Atmospheres, Inc. (N.D. Ohio, E.D., 1961), 201 F Supp 191, 202.

Aetna Freight Lines, Inc. v. R. C. Tway Company (Ky 1961), 352 SW2d 372, 373-374.

Friedman v. Typhoon Air Conditioning Co. (E.D. N.Y., 1962), 205 F Supp 22, 24-26.

11. There must be an identity of parties in the two actions, between whom the rules of res judicata are claimed to be effective, before the doctrine of res judicata may be applied.

Restatement, Judgments, Secs. 79 and 96, Comment a.

30A AmJur, Judgments 447, Sec. 397.

Freeman on Judgments (5th ed) 1193, Sec. 562.

Morrison v. Holladay, 27 Or 175, 180, 39 P 1100, 1102 (1895).

Parkersville District v. Wattier, 48 Or 332, 336, 86 P 775, 776 (1906).

Bartholmae Oil Corp. v. Booth, 146 Or 154, 162, 28 P2d 1083, 1085 (1934).

Storm v. Nationwide Mutual Ins. Co., 199 Va 130, 97 SE2d 759, 761-764, 69 ALR2d 849 (1957).

12. Where several claims arise out of the same transaction, separate suits may be brought for each liability as it accrues, since the same transaction or state of facts may give rise to distinct or successive causes of action. A judgment on the first will not be a bar to the second.

ORS 11.030.

1 AmJur2d, Actions 650, Sec. 131.

Freeman on Judgments (5th ed) 1242, Sec. 588.

Sewall Paint & Glass Co. v. Booth Lumber & Loan Co. TexCivApp 1931), 34 SW2d 650, 653, affd (TexComApp 1932), 50 SW2d 793.

13. Injury or damage is an essential element of a cause of action at law. If an act is not legally injurious until damage or loss is sustained as a consequence thereof, no cause of action accrues until the loss or damage occurs.

1 AmJur2d, 596, Sec. 66; p. 617-618, Sec. 88.

Berry v. Branner, _____ Or _____,83 OrAdvSh 757, 761-765, 421 P2d 996, 998-1000 (1966).

ARGUMENT

A cause of action must exist before an action can be commenced, and its existence or nonexistence is dependent upon the state of facts existing when the action was begun, not at some subsequent time. **1 Am-Jur2d,** Actions, 590, Sec. 58; p. 616, Sec. 87; **Freeman on Judgments** (5th ed) 1510, Sec. 716; **City of Reedsport v. Hubbard,** 202 Or 370, 384, 274 P2d 248, 254 (1954). A judgment cannot operate as a bar of rights which did not accrue until after the action was brought. **Restatement, Judgments,** Sec. 54; **Freeman on Judgments** (5th ed) 1258, Sec. 597; **Hunter v. Roseburg,** 80 Or 588, 598, 599, 156 P 267, 270, 157 P 1065 (1916). The doctrine of res judicata is confined to the

issues as tendered by the pleadings, and does not extend to matters which might have been litigated under issues formed by additional pleadings. 30A**AmJur,** Judgments 422, Sec. 375. Applying these rules to the facts here, that Rockwood filed its action on March 1, 1963, and that the Electronic plant was not in existence at that time, the conclusion is inescapable that the judgment in Rockwood vs. Beall is not res judicata as to any cause of action of Electronic against Rockwood or Beall, unless Rockwood had a mandatory duty to amend and supplement its complaint against Beall so as to plead a right to recover Electronic's alleged damages which had arisen while Rockwood vs. Beall suit was pending.

Considering that when the time was opportune to make known its views, that is, before trial of Rockwood vs. Beall, General maintained a stony faced silence, it may be pertinent to inquire what course of action was available to General, before discussing Rockwood's duty, if any. In **Barendrecht v. Clark,** ------Or------, 83 OrAdvSh 409, 419 P2d 603, General Insurance Company of America filed a motion in the Supreme Court of Oregon to intervene in an appeal pending in that court. The Oregon court held that **ORS** 13.130[1] did not preclude the belated motion, and said:

---

[1] **ORS** 13.130: "At any time before trial any person who has an interest in the matter in litigation may, by leave of court, intervene . . . . "

"Adopting this interpretation, we find no obstacle in granting the petition for intervention if General, as an indemnitor, has standing to invite our examination of its alleged interest." (83 OrAdvSh 409 at 412, 419 P2d 603 at 605)

It is thus established that General could have filed a motion or petition to intervene in Rockwood vs. Beall, addressed to the sound discretion of the trial court. True, it is quite doubtful that grounds existed to incline the court favorably toward such an application, for reasons next to be discussed, but the remedy, if any was needed, lay in General's hands.

General contends, for the first time on appeal,[1] that when Rockwood received notice from Electronic in July, 1964, of Electronic's intention to claim damages, Rockwood should have filed an amended complaint for a declaratory judgment, declaring its rights against Beall as a result of the Electronic claim. In the absence, however, of any request or even suggestion from General that it do so, Rockwood had no duty to amend or supplement its complaint against Beall in any way, for the following reasons:

---

[1] If there should be any doubt that this contention is advanced for the first time on appeal, the court has the power to direct that the briefs submitted to the trial court be sent up.

(1) Rockwood had no right to amend and supplement, bringing in a new party with a new and distinct cause of action. The applicable rule was stated by the late Judge Fee in **United States v. Southern Pac. Co.** (D. Ore 1947), 75 F Supp 336, 339, as follows:

> " . . . A new and distinct lawsuit should never be injected into a case by filing a supplemental pleading. This rule is inherent in all systems of pleading, common law, code or federal. It is required by the necessities. Confusion would otherwise result . . . "

The Supreme Court of Oregon, construing **ORS** 13.110[1], has held in a series of not less than six decisions, beginning with **Tichenor v. Coggins,** 8 Or 270, 271-272(1880) through **Union High Dist. No. 2 v. LaClair,** 218 Or 493, 495-497, 344 P2d 769, 770-771 (1959), that the Oregon Code of Civil Procedure contemplates that the issues be determined as they are presented for adjudication between the original parties to an action, and that it is only when they cannot be determined without prejudicing the rights of others, that other parties can be brought in by the court.

---

[1] **ORS** 13.110. "In actions or suits the court may determine any controversy between parties befored it, when it can be done without prejudice to the rights of others, or by saving their rights; but when acomplete determination of the controversy can not be had without the presence of other parties, the court shall cause them to be brought in."

(2) It would be unreasonable to expect Rockwood to stir up litigation against itself, especially when it has always denied any liability to Electronic, and in the pending action of Electronic vs. Rockwood and Beall, is vigorously disputing any liability. It is to be recalled that Electronic gave notice of alleged breach of warranty on July 9, 1964, but did not file its action against Rockwood and Beall until January 25, 1966. In the meantime, Rockwood had strong grounds to believe that Electronic had abandoned its claim.

General next contends that an insurer's rights of subrogation are derived from the insurer's right to recover against the wrongdoer. That Rockwood had a right to recover from Beall its possible future contingent liabilities to its users, such as Electronic and Spanglers, resulting from the failure of the asphalt pipe lining, which in turn may have at times caused the water distributed by Rockwood to contain asphalt particles. General draws the conclusion from these premises that such possible future contingent liabilities could have been included in Rockwood's claims of damages in its action against Beall, and since they were not, that the judgment therein is res judicata as to any such liability.

Before turning to the authorities of the law, it might be pertinent to explore briefly the significance of General's contention.

Does General contend that Rockwood's attorneys should have knocked on every door of the 8,400 families and businesses in the district, to encourage them to submit claims for damages against Rockwood or its insurer? The race to join in the raid on Rockwood's public treasury can well be imagined. If this were done, should the individual claimants have been joined as parties in the action against Beall? What would be the effect on any not joined, or those who had no claims at that time, but did sustain damages at some subsequent time? Or, perchance, does General contend that Rockwood should have included a claim for a slush fund in its action against Beall, to cover possible future liability to its users? If the obstacle of speculative damages could be hurdled in the action against Beall, what is General's solution if the fund should prove too small? Or too large?

If a consumer recovers damages from a distributor, either by adjudication and payment or voluntary adjustment and payment, for the consumer's loss due to a defective product purchased from the distributor, the distributor has a prima facie right to claim idemnification from the manufacturer. The consumer's claim for damages in the event of such payment is then owned by the distributor. Rockwood, however, has never made any payment to Electronic; thus has never become subrogated to Electronic's rights, if any, against Beall. The Oregon court has consistently held that payment of the

debt for which another is primarily responsible is essential to a claim of subrogation. **Furrer v. Yew Creek Logging Co.,** 206 Or 382, 388, 292 P2d 499, 502 (1956); **Hult v. Ebinger,** 222 Or 169, 190, 352 P2d 583, 592 (1960). It follows that Rockwood could not attempt to recover in its action against Beall the damages, if any, sustained by Electronic.

Some courts have held, however, that something less than payment will suffice upon which to ground a claim of indemnity. The fountainhead of the law on this subject is **Randall v. Raper,** Q.B. 4 Jur. (N.S.) 662, El. B & El. 84, 120 Eng Rep 438 (1858). In that case plaintiffs, seed merchants, brought action to recover their own damages, as well as those of four farmers, to whom plaintiffs had sold barley seed, passing on to the subvendees a warranty of quality similar to the grower's warranty given to plaintiffs. The seed turned out to be not as warranted; it produced inferior crops. The four farmers made claims upon the plaintiffs, who agreed to satisfy them, but no amounts were fixed. There was a judgment for plaintiff by default, and on hearing on a writ of inquiry to assess the damages, the damages of the plaintiffs and those of the four purchasers from them were proved, and verdict entered thereon. This was upheld by the Queen's Bench. Erle, J., in one of the four opinions of the judges, said:

"But then it is said that here the plaintiffs have

made no actual payment; so that, if they recovered such damages in this action, they might put them into their own pockets without paying the sub-vendees. But I think that the true rule is, that a liability to loss is sufficient to give the party a title to recover." (El. B. & El. 84 at 90; 120 Eng Rep 438 at 441)

With recent developments in the law of product liability, marked by the discarding of the necessity of privity of contract in warranty actions, and the imposing of strict liability in tort actions, there has been a tendency to overlook that **Randall v. Raper** involved a few known consumers and required actual legal liability and proven damages. A considerable body of judicial opinion has accumulated, extending the distributor's right of indemnification to cases of anticipatory damages, that is, where the distributor has not adjusted or paid any claims of his consumers, but is seeking indemnity from his manufacturer for possible losses. The decisions are in conflict as to when anticipatory damages can be allowed. One writer has classified the precedents in three catagories, as follows:

(1) Allowing the distributor to recover from the manufacturer damages for the probable, natural and necessary consequences of the allegedly defective product, without attempting to establish the standards;

(2) Refusing to adopt the rule of probable liability, and restricting recovery to those instances where the distributor's liability to his consumers has been adjusted, adjudicated, or paid; and

(3) Allowing anticipatory indemnification, but requiring that actual legal liability be established; not nebulous, uncertain, or speculative, but foreseeable, reasonable, and subject to calculation.

Some of the decisions are collected in Points 9 and 10 of the Points and Authorities, p. 33 hereof, but this is not an exhaustive collection.

It can well be doubted whether the rule of anticipatory indemnification is applicable at all in a situation where the identity and number of possible claimants is unknown, where the distributor does not admit but disputes liability to the consumer, or where, as pointed out in **Superwood Corporation v. Larson-Stang, Inc.** (8th Cir., 1962), 311 F2d 735, 739, the manufacturer's product is not resold as such. It is scarcely necessary, however, to reach the question of the applicability of the rule of anticipatory indemnification, or some modification thereof, as the Electronic claim was a new and distinct cause of action, arising during pendency of Rockwood's action against Beall.

Cohan v. Associated Fur Farms, 261 Wis 584, 53 NW2d 788 (1952), relied on by General, applied the rule of probable liability to the facts in that case so as to render the distributor's (Associated's) action against the manufacturer (Armour) for loss of the distributor's own mink due to feeding them contaminated animal food obtained from the manufacturer (Armour)

res judicata as to the consumer's (Cohan's) action against the distributor (Associated), where the distributor had not sought recovery of its probable liability for its consumer's damages in its action against the manufacturer. This case is sharply distinguishable, however, from the present case in these respects:

(1) In the **Cohan** case, the consumer's cause of of action had accrued before the distributor had brought action to recover its own damages from the manufacturer; while here the consumer's (Electronic's) plant was not even in existence when Rockwood sued to recover its own damages from Beall.

(2) The distributor (Associated) attempted to mislead and deceive the consumer (Cohan) when the consumer complained to the distributor of the death of his mink. The distributor denied loss of mink due to food contamination but thereafter filed a case against Armour for the loss of its own mink.

(3) The liability of the distributor (Associated) to the consumer (Cohan) in some amount apparently was not disputed, as the distributor cross-complained against the manufacturer, seeking recovery of the consumer's (Cohan's) damages in the event the distributor was held responsible to the consumer; whereas the liability of Rockwood to Electronic has always been disputed.

General's argument overlooks that there must be an identity of parties before the doctrine of res judicata may be applied. As set forth in **Restatement, Judgments,** Sec. 96, Comment a, a person is not entitled to

litigate the same issue **with the same adversary** in more than one action. To the same effect: 30A **AmJur,** Judgments 447, Sec. 397 **Freeman on Judgments** (5th ed) 1193, Sec. 562; **Morrison v. Holladay,** 27 Or 175, 180, 39 P 1100, 1102 (1895); **Parkersville District v. Wattier,** 48 Or 332, 336, 86 P 775, 776 (1906); **Bartholmae Oil Corp. v. Booth,** 146 Or 154, 162, 28 P2d 1083, 1085 (1934); **Storm v. Nationwide Mutual Ins. Co.,** 199 Va 130, 97 SE2d 759, 761-764, 69 ALR2d. 849. Also, whatever the rule may be elsewhere, in Oregon a cause of action does not accrue until a person discovers that he has sustained damage. **Berry v. Branner** ------- Or -------, 83 OrAdvSh 757, 761-765, 421 P2d 996, 998-1000 (1966). When Electronic's cause of action accrued in July of 1964, it was a new and distinct cause of action, and not an additional element of Rockwood's damage, as contended for by General, for which it cites several authorities involving quite dissimilar situations. The common law rule applicable here is codified in Oregon by **ORS** 11.030, as follows:

> "Successive actions or suits may be maintained upon the same contract or transaction, whenever, after the former action or suit, a new cause of action or suit arises therefrom."

Illustrative of this rule is **Sewall Paint & Glass Co. v. Booth Lumber & Loan Co.** (TexCivApp 1931), 34 SW2d 650, affd (TexComApp 1932), 50 SW2d 793, where the Lumber Company claimed indemnification from

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH D. StMARTIN,
Of attorneys for appellee.

No. 22190

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AL INSURANCE COMPANY OF AMERICA,
poration,

Appellant,

v.

OOD WATER DISTRICT, a municipal
ration,

Appellee.

APPELLANT'S REPLY BRIEF

peal from the Final Judgment of the United States
District Court for the District of Oregon

THE HONORABLE ROBERT C. BELLONI, Judge

MILLER, ANDERSON, NASH & YERKE
IC A. YERKE, JR.
P. LOWMAN
00 American Bank Building
rtland, Oregon 97205

orneys for Appellant

FILED
JAN 1968

INDEX

TABLE OF CASES AND AUTHORITIES

Cases

TEXTS

STATUTES

No. 22190

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERAL INSURANCE COMPANY OF AMERICA,
corporation,

Appellant,

v.

CKWOOD WATER DISTRICT, a municipal
rporation,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the Final Judgment of the United States District Court for the District of Oregon

THE HONORABLE ROBERT C. BELLONI, Judge

PRELIMINARY STATEMENT

Appellee has opened its brief with a lengthy dis-
ssion of purported facts (appellee's brief, pages 1-8).

The issue in this case is one of law. Therefore,
pellant does not deem any further factual discussion to be
cessary, and for the relevant factual framework it refers
e court to the statement of facts in its opening brief
ppellant's brief, pages 3-8).

ARGUMENT

Appellee has failed to refute appellant's showing that e District Court erred when it held that appellee's judgment ainst Beall did not prejudice or render valueless appellant's ght of subrogation.

To summarize, appellant showed the court in its ening brief that (1) the judgment appellee obtained against all destroyed or rendered valueless appellant's right of brogation in any future proceeding against Beall because of e defense of res judicata, and (2) accordingly, appellee by s own conduct has destroyed its rights, if any, under the licies.

Appellee has attempted to refute appellant's showing four arguments, which may be summarized as follows:

1. Appellant may not assert the loss of its subrogation rights because of (a) the contents of a letter dated July 12, 1965, denying coverage (appellee's brief, pages 10-11) and (b) the fact that appellant denied coverage (appellee's brief, pages 11-14);

2. The loss of appellant's subrogation rights resulted from its failure to take action to protect such rights (appellee's brief, pages 14-29); and

3. Appellee's judgment against Beall is not res judicata of the claims involved in this case (appellee's brief, pages 30-48).

These arguments will be discussed and exposed seriatim.

1. Contents of letter dated July 12, 1965

Relying on a letter dated July 12, 1965, appellee con-
ds that (1) appellant denied coverage on specified grounds,
including loss of subrogation rights, and (2) as a result,
waived the right to rely on its loss of subrogation rights.

In this connection, the facts are as follows:

By letter dated October 23, 1964, appellant advised
ellee that the latter's action against Beall was prejudicial
appellant's right of subrogation against Beall (Ex 1 to Ex 91):

> "If at some later date we should settle such claims or pay any judgment, it would appear that our right to subrogation against Beall Pipe & Tank Corp. has been lost by your filing of the lawsuit to which reference has been made and to proceeding to trial of such lawsuit."

The letter dated July 12, 1965, referred to by
ellee, stated in part as follows (R 162):

> "Occurrences, as defined in the policy are covered by the policy. However, 'occurrences' as defined in the policy refer to 'unexpected' happenings or exposures. It is apparent that the Spangler and Electronic Specialty Company claims do not fall in this category inasmuch as they were preceded by a number of similar claims extended over a period of some years. In addition, we were not given timely notice of the occurrences as required by conditions of the policy. Further, there is no coverage for losses caused by improper performance or nonsuitability for its intended purpose of goods or products.
>
> "It is our position, therefore, that for the foregoing reasons, among others, no coverage exists for those two claims under the subject policy." (Emphasis added)

As authority for its argument, appellee relies on

Am Jur, Insurance, Section 1098, pages 262-263

ch provides as follows:

"There are many cases asserting the rule that where an insurer denies liability for a loss on one ground, at the time having knowledge of another ground of forfeiture, it cannot thereafter insist on such other ground if the insured has acted on its asserted position and incurred prejudice or expense by bringing suit, or otherwise. No waiver or estoppel results, however, where the ground of forfeiture not asserted is one which could not have been cured by the insured, or where no prejudice results to the claimant from reliance on the statement of the insurer. Furthermore, the rule does not apply to grounds of objection not known to the insurer, nor does it apply if the denial of liability is accompanied by a reservation of defenses other than those specified." (Emphasis added)

Appellee also relies on two Oregon cases,

Ward v. Queen City Ins. Co.
(1914) 69 Or 347, 138 Pac 1067

and

Eaid v. National Casualty Co.
(1927) 122 Or 547, 259 Pac 902

Neither of these cases detract from the above quoted

atement from American Jurisprudence; in fact, both confirm

e same.

Thus, in the Ward case (1) the insurer denied liability

the sole ground that the insured had increased the hazard of

s risk and (2) the insured accepted this as the sole ground for

e insured's denial of liability, and in reliance on this

tement changed his position to his prejudice. The court

ted (69 Or 352-353, 138 Pac 1068):

> "After the lapse of some months subsequent to the fire, defendant expressed its declination to meet the terms of the contract of insurance upon the sole ground that certain acts of the plaintiff had increased the hazard of its risk. Accepting this position of defendant's as the battleground, plaintiff employed counsel and initiated this action. By this conduct, defendant led plaintiff to believe that there was but one reason for its denial of liability; consequently, under such circumstances, defendant should not be permitted to screen itself from liability on grounds other than the one specified in the letter indited by its legal representative, provided defendant had informed itself prior to the letter of the cause of the fire, and was in possession of the material which it now claims exculpates it from liability. 'Every consideration of public policy demands that insurance companies should be required to deal with their customers with entire fairness and frankness. They may refuse to pay without specifying any ground, and insist upon any available ground, but, when they plant themselves upon a separate defense and so notify the insured, they should not be permitted to retract if the latter has acted upon their position as announced, and incurred expenses in consequence of it,' said Mr. Chief Justice Church, speaking for the Court of Appeals in Brink v. Insurance Co., 80 N.Y. 108."

The Eaid case is similar to the Ward case factually

the decision therein is based on the Ward decision.

Applying the principles outlined in the foregoing

horities to the case at bar: Appellee was advised in

ober, 1964, that appellant claimed loss of subrogation rights.

letter dated July 12, 1965, reserved other grounds for

ying liability not specifically set forth in that letter.

refore, appellee was fully on notice that other defenses

e claimed, and, specifically, that loss of subrogation rights one such defense. Accordingly, appellee is not prejudiced, its argument as to waiver must fail.

2. Assertion of loss of right of subrogation

Appellee's next argument (appellee's brief, pages 14) is that because appellant denied policy coverage on unds other than loss of its right to subrogation against ll, appellant cannot now rely on such loss.

In support of this proposition, appellee relies on horities to the effect that an insurer cannot at the same e both (1) deny policy coverage and (2) assert loss of rogation rights by reason of the insured's settling of a im. The purport of the authorities relied on is summarized the following annotation cited by appellee:

o., "Consequences of liability insurer's refusal to assume ense of action against insured upon ground that claim upon ch action is based is not within coverage of policy," ALR2d 694, 744

> "It appears to be well settled that an insurer cannot breach its contract by unjustifiably refusing to defend an action against the insured, upon the ground that the claim upon which the action was based was outside the coverage of the policy, and at the same time take advantage of a policy provision prohibiting the insured from settling any claim except at his own cost without the consent of the insurer. Consequently, an insurer's unjustified refusal to defend relieves the insured from his contract obligation not to settle, and the insured is at liberty to make a reasonable settlement or compromise without losing his right to recover on the policy."

This rule clearly does not apply to the case at bar. s, the facts herein with respect to the Beall litigation are follows:

1. Appellee filed its action against Beall on March 1, 1963 (see appellant's brief, page 5).

2. October 7, 1964, appellant learned for the first time of appellee's pending action against Beall (see appellant's brief, page 6).

3. October 12, 1964, trial commenced in appellee's action against Beall (see appellant's brief, page 6).

4. By letter dated October 23, 1964, appellant advised appellee that its action against Beall was prejudicial to appellant's right of subrogation against Beall (see appellant's brief, pages 6-7).

5. March 2, 1965, judgment was entered for appellee in its action against Beall (see appellant's brief, page 7).

6. July 12, 1965, appellant advised appellee that the Electronic and Spangler claims were not within the policy coverage (see appellant's brief, page 7).

To summarize, therefore, shortly after appellant rned of appellee's action against Beall, it advised appellee t such action was prejudicial to its right of subrogation inst Beall. It did not deny policy coverage or in any way

pudiate the policies or release appellee from its policy
ligations. Appellee pursued its action against Beall to
igment.

At this point, of course, (1) appellee's litigation
ainst Beall was concluded and there was nothing further for
to do in the way of pursuing the wrongdoer, and (2)appellant's
ght of subrogation was extinguished and with it appellee's
ghts, if any, under the policies.

Thereafter, appellant did deny policy coverage,
serving the right to rely on its loss of subrogation rights
upra, page 3), which had been previously properly asserted.

The rationale of the authorities cited by appellee
, as indicated, that when the insurer denies liability under
policy, it in effect repudiates the policy. As a result, it
nnot at the same time confirm the policy by holding the
sured to the policy provisions relating to preservation of
brogation rights.

The rationale does not apply in this case. Therefore,
e authorities are not apposite, and appellee's argument must
il.

3. Cause of appellant's loss of its right of
brogation against Beall

Appellee next contends (appellee's brief, pages 14-29) at appellant lost its right of subrogation against Beall cause of its own conduct in failing to take timely action to otect such right.

This argument is based on a long dissertation as to tters which appellee contends are facts. In other words, ellee is attempting to show that appellant had long-standing tice with respect to the Beall litigation, and that by reason inactivity during this lengthy period, it cannot now assert loss of subrogation rights.

Insofar as the facts are relevant as a framework for determination of the question of law before this court, ellant refers the court to the statement set forth in its ening brief (pages 3-8). That statement outlines the true quence of events as supported by the record. Appellant will, wever, refer briefly to the facts relative to its notice of e Beall litigation, which are as follows:

On October 7, 1964, appellant's representatives Thomas Wernette, Thomas K. Klosterman, Jr., and Charles G. Carson tended a meeting at Electronic's plant (Ex 91, page 7). At at meeting, to repeat, appellant learned <u>for the first time</u> at appellee had commenced a lawsuit against Beall, which was en on the eve of trial (Ex 91, pages 9, 11; Ex 18; Ex 90, ges 16-17).

Appellee relies on testimony of Stephen Parker that advised Wernette of appellee's action against Beall in late tember, 1964. This testimony was, however, a matter of ubstantiated memory, and the evidence establishes that such ory was faulty:

1. Wernette testified definitely that he first learned of the Beall litigation on October 7, 1964 (Ex 91, pages 9-11). His testimony is supported by a letter he wrote appellee on October 23, 1964 (Ex 18), which states in part:

> "In a conference which took place at the Electronics Specialty Co. plant on October 7, 1964, we learned for the first time that you had instituted a lawsuit against Beall Pipe & Tank Corp., who had sold certain pipe to you and which you apparently believed to be the cause of the difficulties at the Electronics Specialty Co. plant, and that in this lawsuit, which had been filed on March 1, 1963, you were asserting claims against the seller based upon claims which had been asserted against you. * * *"

2. October 17, 1964, Klosterman prepared a memorandum (Ex 16) which stated in part that "We had no knowledge of this action until three (3) days before it (the trial) commenced."

3. Carson testified that he did not learn of the Beall litigation until the October 7, 1964, meeting (Tr. 115).

Appellee also relies on the testimony of Klosterman at s second deposition (Ex 98). In that deposition, Klosterman nentarily placed at September 21, 1964, a courthouse meeting th counsel for appellee involving a discussion of the Beall tigation. However, this testimony was obviously due to a ssing confusion. Klosterman was quite definite on his first position that he first learned of the action against Beall on tober 7, 1964, and he reconfirmed this fact upon cross-amination at his second deposition (Ex 98, page 21). Further-re, this testimony is corroborated by Klosterman's memorandum ted October 17, 1964 (Ex 16).

It is not clear to appellant what it could have done this point to protect its right of subrogation. When it arned of the Beall litigation, appellee was ready for trial the same, and appellant had no standing to proceed.

Appellee suggests (appellee's brief, page 38) that tervention would have been proper. However, under the Oregon tervention statute,

ORS 13.130

third party may intervene in an action only (1) if his right interest is of such direct and immediate character that he ll gain or lose by the direct legal operation of the judgment d (2) the issues he raises are within the scope of the original tion. See:

ne v. McDonald (1938) 158 Or 364, 75 P2d 10

This was an action by an individual who was injured an automobile accident against the insured tortfeasor. The endant's insurer filed a complaint in intervention seeking to enjoin further proceedings, (b) a determination that the icy was void as to the accident involved because of fraud by plaintiff and defendant, and (c) to perpetually restrain intiff and defendant from proceeding against it. A demurrer the complaint in intervention was sustained.

This court stated (158 Or 370-371, 75 P2d 13):

"The generally accepted rule is that the right or interest which will authorize a third person to intervene must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation of the judgment: * * *

"It is obvious that the direct legal operation of the judgment in the case at bar would not cause intervener either to gain or lose anything.

"It is equally apparent that the complaint in intervention herein tenders an entirely new and different issue from those of the complaint.

"'The courts have always striven to maintain the integrity of the issues raised by the original pleadings, and to keep newly admitted parties within the scope of the original suit. * * * The injection of an independent controversy by intervention is improper.' 21 C.J. Subject: Equity, p. 343, § 341."

Tested by these standards, appellant clearly could not e intervened in appellee's action against Beall.

In summary, appellee destroyed defendant's right of rogation against Beall, and it certainly should not be per- ted to shift the blame for its own conduct.

4. Res judicata

In its fourth and final argument (appellee's brief, es 30-48), appellee contends that its judgment against Beall not res judicata of any claims against Beall arising out of Spangler and Electronic matters.

As indicated in appellant's opening brief, appellee ed an action against Beall on March 1, 1963, which resulted judgment on March 1, 1965, for the following (R. 204):

"1) diminution in the value of the pipe;

"2) depreciation in value of the District's water system;

"3) expense in removal of loose asphalt material from the system; and

"4) expense of repairing and replacing parts of the system."

The question presented is whether, if Electronic covers damages arising out of appellee's use of the defective pe from appellee, appellee (or appellant, by right of rogation) can recover such damages in a new action against all.

A simple examination of appellee's judgment against all reveals that it has already recovered the full amount

its losses arising from the use of the defective pipe. ordingly, no further recovery may be had from Beall.

Appellee does not discuss the nature of the existing gment. Rather, it contends that it could not have recovered the Electronic claim in its prior action against Beall, and t as a result this matter is open to litigation in some ure action naming Beall as a defendant. In this connection, ellee's argument may be summarized and analyzed as follows:

1. Appellee could not have filed an amended and plemental complaint bringing a third party into the case ppellee's brief, page 40). This is supposedly in refutation appellant's statement (appellant's brief, page 21) that ellee could have filed an amended complaint containing a ayer for declaratory judgment as to its rights against Beall h respect to Electronic's claims. Of course, this would not ve involved bringing in any third party nor would it have judiced the rights of any third party. It would merely have solved a question between appellee and Beall as to the trans-ion in suit.

In this connection, appellee ignores the fact ppellant's brief, page 21) that it could have delayed trial its action against Beall pending determination of the ntroversy between it and Electronic.

2. Appellee could not be expected "to stir up liti-
ion against itself" (appellee's brief, pages 41-42). The
ctronic matter as an existing controversy can hardly be
ced in this category.

3. Appellee was not entitled to recover from Beall
the Electronic claim because the amount of damages had not
n established (appellee's brief, pages 42-46). Appellant has
lyzed appellee's rights against Beall in its opening brief,
no further comment need be made here. However, assuming for
moment that appellee were correct, again, why did it not
k a declaration as to its rights against Beall with respect
the Electronic claim or delay trial pending a determination
the same?

4. Identity of parties is required in order to assert
judicata (appellee's brief, pages 46-47). Of course, there
identity of parties in this case, i.e., Beall and appellee,
appellant, which would have been in privity with appellee by
ght of subrogation.

5. A cause of action does not accrue until a person
scovers that he has suffered damage (appellee's brief, page
). In support of this statement, appellee cites

Berry v. Branner (1966)
83 Or Adv Sh 757,
421 P2d 996

ich holds that a cause of action for malpractice accrues within
e meaning of the statute of limitations, and the statute begins
run when the patient obtains knowledge or reasonably should
tain knowledge of the tort.

The authority does not support the proposition, and
e proposition is irrelevant.

6. Electronic's "cause of action" was a new and
stinct "cause of action" (appellee's brief, pages 47-48).
ain, this is a restatement of a subject which has been fully
alyzed and needs no further discussion.

To repeat, in summary, appellee's judgment against
all bars further litigation against the latter and destroys
pellant's right of subrogation and appellee's rights, if
y, under the policies.

CONCLUSION

For the reasons set forth hereinabove and in appellant's ening brief, the judgment of the District Court should be versed and judgment should be entered for appellant.

Respectfully submitted,

KING, MILLER, ANDERSON, NASH & YERKE

FREDRIC A. YERKE, JR.

JEAN P. LOWMAN

1200 American Bank Building
Portland, Oregon 97205

Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of is brief, I have examined Rules 18, 19 and 39 of the United ates Court of Appeals for the Ninth Circuit, and that, in my inion, the foregoing brief is in full compliance with those les.

FREDRIC A. YERKE, JR.

Of Attorneys for Appellant